was sold by public auction on the 14th day of July, 1933, and was knocked down to the chargee. The chargor claimed that there were irregularities in the sale and brought a suit against the chargee to set aside the sale. At the same time he refused to give possession of the land to the Chargee. The Chargee filed an application in the chargee's proceedings for an order that he be put in possession of the land, by virtue of the provisions of Sections 316, 318 and 319 of the "Civil Procedure Code, 1918."

Held, that an order for sale under Section 149 of the "Land Code, 1926" is within the definition of the word "decree" in the Civil Procedure Code, 1918 and that Sections 316, 318 and 319 of the Civil Procedure Code are therefore applicable.

B. J. P. Joaquim (with him *R. Ramani*) for the chargee. The provisions of "The Civil Procedure Code, 1918" as to execution apply. An order for sale is a "decree" within the definition thereof in Enactment 15 of 1929. The Chargee is eititled to an order for possession under Sections 316, 318 and 319 of "The Civil Procedure Code, 1918."

M. Morrison for the Chargor. "The Land Code, 1926" is exhaustive. It provides no remedy where a Chargor refuses to give up possession. The only remedy for the purchaser is to bring a suit for possession under Section 8 of "the Specific Relief Enactment, 1903." The provisions of "The Civil Procedure Code, 1918" as to execution cannot apply to an order for sale under Section 149 of "The Land Code, 1926," which is not a "decree."

BURTON, J. delivered an oral judgment as follows:—

"The Order for Sale was made pursuant to Section 149 of the Land Code, 1926, which creates no procedure for a case where a Chargor refuses to give possession to the purchaser of the charged land at the Sale held in pursuance of the order. Section 149 of the Land Code, 1926, in requiring a chargor to shew cause only modifies the procedure of that Code to the special circumstances of charged land. The Originating Summons, by which the chargee applied to the Court, was made under Section 486 of the Civil Procedure Code, 1918, as modified by Section 149 of the Land Code, 1926, and therefore the application to the Court was made under the Civil Procedure Code, 1918. This being the case, the order for sale, which follows on the Summons, is made under the Civil Procedure Code, 1918, and is therefore covered by the definition of the word "decree" in that code, as amended by Enactment 15 of 1929. It follows that the *sequelae* of a decree under the Civil Procedure Code, 1918 attach to an order for sale of charged land insofar as those *sequelae* have not been modified by the provisions of the Land Code, 1926. As regards the present case the Land Code, 1926, contains no provisions at all, and I hold that Sections 316, 318 and 319 of the Civil Procedure Code 1918, are applicable, and I make an order for possession of the charged land."

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

GERAHTY, J.

July 14, 1933.

1. KAN TAK FEE
2. NG AH HOE } Plaintiffs.
3. FOO LIN YING

vs.

AU PHIN YEAN.....Defendant.

[PERAK CIVIL SUIT No. 667 of 1932.]

Fraud—The defence of fraud can only be pleaded by an innocent party.

The defendant accepted the transfer of certain property belonging to a third party in furtherance of an arrangement made to defeat the creditors of the latter, and executed a declaration of trust in favour of the plaintiffs, who at that time had no knowledge of the transfer or of the declaration of trust.

The defendant subsequently charged a portion of the property to the Bank of Malaya and ultimately transferred it in satisfaction of the charge.

The plaintiffs who later learned of the existence of the declaration of trust claimed from the defendant the value of the property, so charged and transferred, together with interest.

The defendant alleged that the whole transaction was fictitious and that he was not in fact a trustee for the plaintiffs but acting to assist the original transferor to defeat creditors.

Held, that the defendant could not set up his own fraud in order to avoid the declaration of trust.

Roberts v. *Roberts*, 106 E.R. 401 followed.

S. Seenivasagam for Plaintiffs.

John L. Woods for Defendant.

Cur. Adv. Vult.

GERAHTY, J.—By their plaint the plaintiffs contend that on the 7th December, 1927, Kan Kheng Hin the father of plaintiff No. 1 and husband of plaintiffs Nos. 2 and 3 transferred 10 pieces of land to the defendant to hold the same in trust for the plaintiffs and that on the 9th January, 1928, the defendant by a document marked Exhibit "A" herein, declared himself trustee of the said lands for the plaintiffs.

It is further contended that the defendant between March, 1928, and September, 1929, at the request of the plaintiffs transferred to Kan Kheng Hin or otherwise dealt with 8 pieces out of the 10 pieces of land previously transferred to him and that between July, 1928, and November, 1930, he charged the remaining lands to the Bank of Malaya Limited, Ipoh, with repayment of monies advanced to him, the defendant, by the Bank and that in 1932 he transferred these lands to the Bank in satisfaction of the charges. That these charges and transfers were made by the defendant for his own benefit and without the consent or knowledge of the plaintiffs and in breach of the trust imposed upon him.

The plaintiffs claim $16,000 a sum based on the present market value of the properties so charged and transferred together with interest at 8% from 1st January, 1932, the date upon which the plaintiffs ceased to receive the rents and profits from the lands in question.

The defendant admits the transfer and the declaration of trust, but alleges that it was only a fictitious transaction and that defendant was never in fact a trustee for the plaintiffs and that he never at any time had any dealings with the plaintiffs.

In regard to the properties charged and sold to the Bank of Malaya, Ltd., the defendant contends that although he charged the lands as stated the monies raised were advanced to Kan Kheng Hin as beneficial owner and that at Kan Kheng Hin's request the defendant gave to the Bank of Malaya Ltd., a Power of Attorney to deal with the said lands by virture of which Power the Bank eventually took over the lands for $10,000.

The defendant contends that the object of the transfer by Kan Kheng Hin was to preserve the lands from possible attachment by creditors and that in fact there was no consideration for such transfer and no money belonging to the plaintiffs ever passed in respect of the said lands which at all times he held in trust for Kan Kheng Hin upon whose instructions the defendant duly disposed of the same in full discharge of the real trust imposed upon him. The defendant admits that the whole transaction was fraudulent as against Kan Kheng Hin's creditors, but that he went to his assistance solely as a friend.

During the trial the defendant gave evidence in support of these contentions and purported to show that as regards Kan Kheng Hin he had fully discharged his obligations and that he had not personally derived any benefit from the transaction.

Kan Kheng Hin gave evidence in rebuttal and denied that the object of the transfer was to preserve his property from his creditors and contends that the transaction was a genuine settlement upon his son and wives. He admits that the plaintiffs have never been present at any discussions between the defendant and himself on the subject of the transfer or of the trust.

He further contends that a payment of $10,000 alleged by the defendant to have been made to him was never in fact so made. Both the defendant and Kan Kheng Hin produced documentary evidence of the state of accounts between them which approximately agree with the exception of the item of $10,000 which appears in a chalk-pencil entry in a rough note book kept by the defendant and which does not appear in Kan Kheng Hin's account, and a further item of a cheque for $8,000 and a cross entry for that amount which appears in Kan Kheng Hin's account, but not in the defendant's.

Of the two versions of the transaction in question I place more reliance upon that given by the defendant.

On the evidence before me I find that the transfer of the ten pieces of land by Kan Kheng Hin to the defendant was a fraudulent device to preserve his property from the possibility of attachment by his creditors and that the defendant was a party to that fraud. I find that in declaring himself a trustee of these lands for the plaintiffs the defendant merely regarded himself as providing further protection to Kan Kheng Hin as against his creditors and that so far as the plaintiffs were concerned the whole transaction was fictitious. I find that as between the defendant and Kan Kheng Hin the former has fully discharged his obligations and that the defendant has derived no personal gain from the various transactions.

So far as the plaintiffs are concerned my impression is that they knew nothing of the original transfer or of the declaration of trust in their favour and while it may be that the plaintiffs have been influenced by Kan Kheng Hin in bringing this suit yet I find that they are innocent parties in regard to the fraud and have come into this Court with clean hands.

The defendant has committed himself to a declaration of trust in favour of the plaintiffs and the terms of that document are clear and unambiguous. The question is to what extent, if any, can the defendant set up his own fraud to avoid his obligations under that document. In my view the law is quite clear on this point. No man can be allowed to allege his own fraud to avoid his own deed. In *Roberts* v. *Roberts* 106 E.R. 401 Bayley, J. states the law thus—"There is no doubt, that where two persons agree to commit a fraud, neither of them can expect any assistance from a Court of Law, to relieve him against the consequences of it. This defence ought to have no weight. By the production of the deed, the plaintiff established a prima facie title; and we cannot allow the defendant to be heard in a Court of Justice to say that his own deed is to be avoided by his own fraud." In the same ease Holroyd, J. in giving judgment states—"A deed may be avoided on the ground of fraud, but then the objection must come from a person neither party nor privy to it, for no man can allege fraud in order to invalidate his own deed." This case was cited with approval in *Phillpotts* v. *Phillpotts* 138 E.R. 40. See also *Voddina Kamayya* v. *Gudisa Namayya*, 43 Indian cases 352 in which it was held that where one person transfers his property to another with the intention of defrauding his creditors, the vendee can maintain an action to recover the property if the contemplated fraud has been effected and the vendor cannot set up his own fraud in defence to the claim.

Counsel for the defendant has pointed out that in the cases cited fraud has been pleaded against other parties to the fraud or as against creditors, purchasers or persons interested for valuable consideration and that accordingly they are distinguishable from the facts of the present case in-as-much as no consideration has passed

from the plaintiffs who were unaware of the whole transaction. Counsel, however, has not been able to support this contention with any authorities. It seems to me that it is very difficult to draw any distinction between this case and the cases cited which shew that it is not competent to the defendant to set up the supposed fraud. The defendant must be treated as having done that which he ought to have done. It remains to ascertain what sum is due to the plaintiffs under the trust deed if defendant had not wrongfully prevented anything from becoming due. That sum I fix at $10,000 being the sum for which the properties referred to in paragaph 4 of the plaint were taken over by the Bank of Malaya together with interest thereon at 8% from 1st January, 1932 until payment. Judgment will be entered for the plaintiffs accordingly with the taxed costs of the suit.

Judgment accordingly.

[ORIGINAL CIVIL JURISDICTION]

HEREFORD, J.

November 17, 1933.

TAN HEE JUAN BY HIS NEXT FRIEND TAN SEE BOK.....Plaintiff.

v.

TEH BOON KEAT
LAI SOON

Defendants.

[NEGRI SEMBILAN CIVIL SUIT No. 5 of 1933]

Land Code 1926, s.42—Transfer executed by a minor—Order avoiding the transfer—Discretion of Court to order refund of purchase money—Specific Relief Enactment, ss. 38 and 41.

The plaintiff, an infant, executed transfers of lands in favour of the defendants. The transfers were witnessed and subsequently registered.

The plaintiff by his next friend applied to the Court for an order setting aside the transfers and for incidental relief.

The Court made an order declaring the transfers void, and refused to order the refund of the purchase price paid by the defendants.

Held, that the discretion possessed by the Court under the Specific Relief Enactment will, in the case of contracts which are void, only be exercised where the parties stand in such a fiduciary relationship to one another that it would be unfair to the defendant to allow the plaintiff to retain both the advantage of the purchase money standing as part of his Estate and also to recover the property.

Dutt for Plaintiff.

Hastings for Defendants.

Cur. Adv. Vult.

HEREFORD, J.—In this case it appears that two transfers were executed by the infant Plaintiff of two pieces of land in Mentakab to the two Defendants respectively, and the action actually brought by the Plaintiff's next friend appointed by an order of Court is to have these two transfers set aside and other relief incidental thereto, on the ground that at the time the transfers were executed the Plaintiff herein was a minor. There is no doubt about that fact: it is quite clear now, and I do not think it is seriously disputed, that at the time when the transfers were executed the Plaintiff, Tan Hee Juan, was in fact an infant and, therefore, unable to contract.

The Privy Council have held that the effect of sections 10 and 11 of the Contract Act of India is that an infant cannot make a contract within the meaning of the Act, and that a contract made by an infant is not only voidable but void. (*Mohori Bibee* v. *Dharmodas Ghose*, 30 Calcutta 539). That decision of the Privy Council is binding on this Court, and therefore there can be no doubt whatever that those transfers are void. That being so, as the registration of these proprietors has been obtained by a void instrument, the effect of section 42(iii) of the Land Code is that the registration is void, and I have no option or alternative that I know of or can discover but to declare that registration void. That has the effect of restoring the property to the minor, and the order which I will have to make will be to that effect. To my mind there is no way of avoiding that decision, although I realise there may be circumstances in this case which may make it a harsh one because the Defendants say they had no reason to suppose that the vendor was in fact an infant. Some underhand work in connection with these transfers probably took place, because attached to the transfers there is a certificate by a Solicitor to say that the vendor was in fact of full age. How he came to sign that certificate there is no evidence to shew, but it is difficult to avoid the conclusion that some deception was practised. The Defendants do not claim that there was any deception practised on them: they appear to have accepted the transfers without troubling to enquire who the vendor was and did not even take the trouble to see him. They do not suggest that an adult was put off upon them as the vendor, and the evidence of the infant himself is that he signed these transfers actually in the Solicitor's office while the evidence of the Defendants also shews that they attended the Solicitor's office where they signed the transfers as transferee. It is possible that they and the Plaintiff attended at different times, but I think that the purchaser of these lands who purchased without enquiring as to who the vendor was or taking any steps to see him, must take the consequences if it turns out subsequently that the vendor was an infant and the contract void. However that might be, to my mind, it does not relieve me of the necessity of declaring these two transfers void.

The real question that I have to decide in this case is whether I ought to order that the purchase prices of these lands which were admittedly paid by the Defendants should be refunded to them as a condition precedent to the cancellation of these two transfers. The first case quoted